

DEC 14 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****JAMES V. CAICO,****Plaintiff - Appellant,****v.****MCTERNAN; et al.,****Defendants - Appellees.****No. 04-16657****D.C. No. CV-00-02330-GEB****MEMORANDUM***

**Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding**

Submitted December 5, 2005 **

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

James V. Caico, a California state prisoner, appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action for failure to file a pretrial statement. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of discretion, *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996), and we reverse and remand.

The record shows that Caico filed several requests for extension of time stating that his ability to prepare the pretrial statement was impeded by sporadic access to the law library. The district court granted Caico three extensions, but the record shows that prison officials confiscated Caico's substantially complete pretrial statement immediately after the second extension, and Caico was unable to negotiate its return after filing several internal prison grievances, and requests for injunctive relief with the district court. The district court dismissed the action despite Caico's diligence in pursuing the case, the barriers imposed by imprisonment, and the fact that the case had survived motions to dismiss and for summary judgment. *See Hernandez v. Whiting*, 881 F.2d 768, 771-72 (9th Cir. 1989) (reversing dismissal for failure to prosecute where prisoner pursued his case diligently up to trial and noting "when a prisoner's civil action reaches the trial stage after surviving motions to dismiss and summary judgment, the trial court must take all reasonable steps to insure that the prisoner has his or her day in court."). The district court abused its discretion by dismissing Caico's action

pursuant to Rule 41(b) because the balance of applicable factors weighs against dismissal. *See Dahl*, 84 F.3d at 366.

Caico's February 7, 2005 Motion for Appointment of Counsel is denied pursuant to this court's October 26, 2004 order denying appointment of counsel on appeal and stating that "no motions for reconsideration, clarification, or modification of this denial shall be filed or entertained."

REVERSED and REMANDED.